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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1500

CITICORP,
Petitioner,

against

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Citicorp petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit which denied a petition for review and affirmed an order of the Board of Governors of the Federal Reserve System which purportedly denied Citicorp's application for approval to retain ownership of the Advance Mortgage Corporation.

Opinions Below

The opinion of the Court of Appeals (Appendix A) is reported at 589 F.2d 1182 (2d Cir. 1979). The opinion of the Board of Governors of the Federal Reserve System ("Board") is reported at 64 Fed. Res. Bull. 321 (1978).

Jurisdiction

The judgment of the Court of Appeals was entered January 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Is Citicorp's application to retain ownership of Advance Mortgage Corporation ("Advance") "deemed to have been granted" by operation of law by reason of the failure of the Board to act on the application within the ninety-one-day period prescribed by § 4(c) of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1843(c)?

Statute Involved

The statute involved is the Bank Holding Company Act of 1956, as amended (the "Act," relevant portions of which are set out at Appendix B), and specifically § 4(c), 12 U.S.C. § 1843(c), which provides in part:

> In the event of the failure of the Board to act on any application for an order under paragraph (8) of this subsection within the *ninety-one-day period which begins on the date of submission to the Board of the complete record* on that application, the application shall be deemed to have been granted.
> (Emphasis added.)

Statement

In July 1970, Citicorp acquired 100 percent of the voting stock of Advance Mortgage Corporation. At the time of its acquisition, Advance maintained 19 offices located in 11 states. By late 1977, Advance had grown to 44 offices located in 22 states, which were engaged in:

> (i) the origination and placement with institutional investors of Federal Housing Administration, Veterans Administration and "conventional" mortgage loans on one-to-four family residences;
>
> (ii) the servicing of mortgage loans for institutional investors;
>
> (iii) the origination and servicing of mobile home installment contract loans to be held for investment, and the extension of credit to mobile home dealers for the financing of inventory; and

> (iv) the extension of credit secured by second mortgages on one-to-four family residential properties and the servicing of such loans.

Advance is not a dominant force in the industry or in any local geographic market. Advance operates in 27 SMSA's,* in 24 of which it originates less than two percent of the one-to-four family residential mortgage loans. In the other three SMSA's, Advance's market share is 3.5 percent or less. The number of competitors in the areas serviced by Advance ranges from 12 to 109. In 1976, Advance was responsible for originating only 1.8 percent of the dollar volume of all one-to-four family mortgage loans made by mortgage bankers, and only 0.31 percent of such loans made by the entire mortgage finance industry.

Following the acquisition of Advance, Citicorp, as a result of a statutory amendment, fell within the definition of a bank holding company covered by the Act. Bank Holding Company Act Amendments of 1970, 84 Stat. 1763. As such, Citicorp would be prohibited from retaining its shares of Advance after December 31, 1980, unless the Board granted approval for retention under § 4(c)(8) of the Act.

In 1973, Citicorp (then known as First National City Corporation) applied to the Board for approval to retain Advance. The Board determined that there was insufficient evidence to establish that the public benefits produced by the retention of Advance would outweigh the possible adverse effects. However, the Board noted that Citicorp had applied for retention approval well ahead of the statutory deadline and that additional evidence might become available to

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* An SMSA is a Standard Metropolitan Statistical Area; *see*, County and City Data Book—1972, U.S. Dept. of Commerce, Bureau of the Census, at xxi.

Citicorp before the deadline. Accordingly, the Board denied the 1973 application without prejudice to renewal. 60 Fed. Res. Bull. 50 (1973)

On October 28, 1977, Citicorp filed a new application to retain Advance, which was submitted by Citicorp to the Board by delivery to the Federal Reserve Bank of New York, as required by the Board's Regulations. 12 C.F.R. §§ 225.4(b)(2) and 262.3(b). As also required by the Board, within the thirty days prior to filing the application Citicorp published a notice, in late September, in 45 newspapers in 25 states announcing the application. This notice, which stated that comments on the application would be accepted by the Federal Reserve Bank of New York for thirty days, was published pursuant to the Board's Regulations, and in compliance with the statutory requirement of "due notice and opportunity for hearing." 12 U.S.C. § 1843(c)(8); 12 C.F.R. § 225.4(b)(2). No comments were received.

After analysis of the application, the Federal Reserve Bank, by letter dated November 18, 1977, requested Citicorp to provide specific additional information. On December 5, 1977, Citicorp complied by delivering the requested documents, by hand, to the offices of the Federal Reserve Bank of New York. By letter dated December 13, 1977, the Federal Reserve Bank acknowledged that Citicorp's December 5 submission had completed the record for the Board's consideration and that the application had been forwarded to the Board's office in Washington, D.C. The record is unclear as to when the application actually arrived at the Board's office.*

Thereafter, the Board received no additional material or relevant information concerning Citicorp's retention

* The opinion of the Court of Appeals at one point states that the application was received on December 13 (Citicorp v. Board, *supra*, 589 F.2d at 1187, App. A at 7a) and at another, on December 14 (*id.*, 589 F.2d at 1189, App. A at 12a). In fact, the record does not show the actual date of receipt.

application. On January 9, 1978, the Board published a notice of Citicorp's application in the *Federal Register*, which invited interested persons to submit comments to the Board by January 27. No comments were received in response to this second invitation for comments. Sometime in January or February 1978, the Federal Reserve Bank of New York requested Advance's 1977 year-end financial statements. These were provided to the Board by Citicorp, which specifically stated its belief that the financial statements were unnecessary and that it did not acquiesce in any extension of the statutory mandate that an application under § 4(c)(8) be acted upon within ninety-one days.

The Board did not act upon Citicorp's retention application until the ninety-eighth day after Citicorp's final relevant submission of December 5. On March 13, 1978, the Board issued an order ("March 13 Order") purporting to deny the application. 64 Fed. Res. Bull. 321 (1978). (The year-end financial statements of Advance were not a factor in the Board's ultimate decision, or in the decision of the Court of Appeals.)

Citicorp thereupon petitioned the United States Court of Appeals for the Second Circuit for review and reversal of the March 13 Order, pursuant to 12 U.S.C. § 1848. Citicorp argued, *inter alia*, that the ninety-one day statutory period commenced on December 5, 1977, the day that Citicorp made its final relevant submission to the Board's designated agent, the Federal Reserve Bank of New York. Therefore, the application was "deemed granted" ninety-one days later, on March 6, 1978, seven days prior to the Board's belated March 13 Order.

The court below held that the ninety-one-day statutory time period "began no earlier than January 28, 1978," following the close of the *second* comment period, thus rendering the March 13 Order timely. *Citicorp v. Board*, *supra*, 589 F.2d at 1189, App. A at 13a. The panel also expressed its opinion that the statutory period could not

commence before the time the application was received at the Washington, D.C., office of the Board from the New York Federal Reserve Bank.

Reasons for Granting the Writ

This appeal brings before this Court for resolution an explicit conflict between the decision below and the rule of law established in the decisions of another court of appeals, as well as an important question as to the meaning of the Bank Holding Company Act.

I

Interpretations as to the Meaning of This Section of the Bank Holding Company Act Should Not Be Permitted to Vary Among Circuits

The decision below, as the Court of Appeals itself recognized, is in direct conflict with the decisions of another circuit. The Seventh Circuit, to date the only other circuit to construe the ninety-one-day rule, held in *Tri-State Bancorporation, Inc. v. Board of Governors of the Federal Reserve System,* 524 F.2d 562 (7th Cir. 1975), that "the 91-day period of § 1842(b) [and § 1843(c)] begins to run when the final material needed for the Fed's decision is received from the various interested sources outside of the Fed. . . ." *Id.*, at 566. The Seventh Circuit has adhered to this rule in subsequent cases.*

The Second Circuit has only considered the ninety-one day rule in this case, in which it held that "ordinarily the 91-day period does not begin until at least expiration of the period for comments upon an application." *Citicorp v. Board, supra,* 589 F.2d at 1187, App. A at 8a. In a footnote following this holding, the Second Circuit set out the rule of the Seventh Circuit, and then candidly stated: "Thus

* *See,* North Lawndale Economic Development Corp. v. Board of Governors of the Federal Reserve System, 553 F.2d 23 (7th Cir. 1977).

it would appear that in that circuit the time period could start earlier than the close of the comment period, see *North Lawndale, supra,* 553 F.2d at 26-27 [7th Cir. 1977]." *Citicorp v. Board, supra,* 589 F.2d at 1187, n.9, App. A at 8a. The import of this footnote is clear: the court concedes that the measure of the ninety-one-day period varies depending upon the circuit in which the issue is litigated.

The Seventh Circuit would have disregarded the January 27 close of the comment period (during which no comment was received) and would have looked to the actual receipt of relevant material. Such was the case in *North Lawndale, supra,* in which the statutory period was held to commence just four days following the announcement of a comment period, which was the day when the final relevant submission was received. (A comment period is generally thirty days long. *See, Citicorp v. Board, supra,* 589 F.2d at 1188, App. A at 9a.)

The Second Circuit, to the contrary, would not begin the statutory count until the close of the comment period, without regard to the receipt of any information. For the applicant this difference in interpretation is significant, as the Second Circuit view can potentially add weeks of delay.

Congress commanded that the Board act within ninety-one days. Those ninety-one days should be determined by the same factors whether the bank holding company happens to be located in the Second Circuit or the Seventh. The resolution of these conflicting decisions is important. Bank holding companies have a continuing need, incidental to their growth and the expansion of the services they offer to the public, to apply for Board rulings under § 4(c)(8) of the Act. It is essential that the ninety-one-day time limit within which the Board must act be subject to uniform and consistent administration.

II

The Court of Appeals Wholly Disregarded Facts That Are Part of the Record

The public comment periods are a creation of the Board—not of the statute. The court below decided, however, that the statutory requirement of "due notice and opportunity for hearing," 12 U.S.C. § 1843(c)(8), signified that the ninety-one-day period "does not begin until at least expiration of the period for comments upon an application." *Citicorp v. Board, supra,* 589 F.2d at 1187, App. A at 8a. Even assuming, *arguendo,* that this rule is consistent with the statutory purpose, the panel's ultimate conclusion that the ninety-one days commenced after January 27 entirely ignored the critical fact that January 27 was the expiration of the *second* comment period regarding Citicorp's application.

The Board's rule about notice procedures applicable here states:

> Every such application shall be accompanied by a copy of a notice of the proposal (in substantially the same form as [form] F.R. Y-4B) published within the preceding 30 days in a newspaper of general circulation in the communities to be served. The Board will publish in the Federal Register notice of any such application and will give interested persons an opportunity to express their views . . . .

12 C.F.R. § 225.4(b)(2).

The recommended notice set forth in form F.R. Y-4B contains the following language: "Persons wishing to comment on this proposal should submit their views in writing within 30 days of the date of publication of this notice to . . ." the appropriate Federal Reserve Bank. *See,* 3 Fed. Banking L. Rep. (CCH) ¶ 44,058 (1977).

Citicorp satisfied the notice provisions of 12 C.F.R. § 225.4(b)(2) before filing its application to retain Advance on October 28, 1977. Citicorp's notice, in the form prescribed by the Board, was placed in 45 newspapers of general circulation in 25 states on or about September 28, 1977. This notice invited comments, and asked that any comments upon Citicorp's application be directed to the Federal Reserve Bank of New York within 30 days of publication.

The Court of Appeals ignored this first notice period, certainly a significant omission. Instead, it erroneously relied upon the second, and redundant, notice which appeared in the *Federal Register* of January 9, 1978, more than one month after Citicorp's final relevant submission. If, as the court below did recognize, the purpose of the ninety-one-day rule was to encourage the expeditious disposition of applications, to eliminate "sluggish Board action," *Citicorp v. Board, supra,* 589 F.2d at 1186, App. A at 6a, and to require the Board to act with "reasonable promptness" *id.*, at 1188, App. A at 9a, duplicative and time consuming procedures cannot be condoned. The court adopted the theory that "the expiration of the period for comments" was controlling, yet failed to apply this rule to the facts in the record before it.

III

The Court of Appeals Misapprehended the Congressional Purpose of the Statute Before It

The Second Circuit, in holding that the ninety-one-day period did not commence prior to the close of the comment period on January 27, and in suggesting that the time period could not have commenced prior to receipt of the application at the Board's office in Washington on or about December 13, has failed to recognize either the Congressional purpose underlying the time limit or the chain of events surrounding Citicorp's application.

The legislative history of the ninety-one-day time limit makes very clear that it was imposed to correct the Board's practice of unduly delaying the processing of applications.

See, e.g., H.R. Rep. No. 91-387, 91st Cong., 2nd Sess. 13 (1970). Both the Second and the Seventh Circuits have stated that the purpose of the time limit would not be achieved if the Board or its agents retained the power to control its passage: "The rule would lose much of its effectiveness . . . if the Fed had discretion to determine when the 91-day period begins to run." *Central Wisconsin Bankshares, Inc. v. Board of Governors of the Federal Reserve System*, 583 F.2d 294, 296 (7th Cir. 1978) (cited favorably in *Citicorp v. Board, supra*, 589 F.2d at 1187, App. A at 8a). Yet the two events which the Second Circuit recognizes as potentially opening the ninety-one day period are both within the absolute control of the Board or the local Federal Reserve Bank, the Board's agent by delegation in the processing of applications.

One such event was the acknowledgement, on December 13, 1977, by the Federal Reserve Bank of New York of the prior receipt of the complete Citicorp application and the announcement that the application had been transmitted to Washington. The other such event, which the court below recognized as paramount in this case, was the close of the second comment period on the day fixed by the Board, January 27, 1978, without any comment having been received. It is plain that both of these events are within the Board's control, and thus afford it the opportunity to defeat the legislative purpose underlying the statute. *See, Tri-State Bancorporation, Inc. v. Board, supra.*

The history of Citicorp's application illustrates the necessity of a rule limiting the discretion of the Board and the Reserve Banks to control the statutory clock. The New York Reserve Bank took a total of 46 days to consider the application before forwarding it to the Board. It had the initial application for 21 days—from October 28 to November 18—before it requested specific additional information from Citicorp. The New York Reserve Bank then had the complete application for an additional eight days—from December 5 through December 13. Yet the Second Circuit would exclude these 46 days of analysis and processing from the statutory ninety-one days.

While the Second Circuit recognized that Congress was aware of the practice of having a local Reserve Bank "clean up" applications prior to transmission to Washington, *Citicorp v. Board, supra*, 589 F.2d 1187, App. A at 7a, it is inconsistent with the purpose of the statute for that court to grant the Board a series of undefined and discretionary "clean up" periods outside of the ninety-one days permitted under the statute. Such a view can only encourage the "sluggishness" the statute was designed to eliminate.

CONCLUSION

This petition for a writ of certiorari should be granted, and upon review the decision of the court below should be reversed.

Respectfully submitted,

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April 2, 1979

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 103—August Term, 1978.

(Argued November 1, 1978
Decided and Filed January 2, 1979.)

Docket No. 78-4039

CITICORP,

Petitioner,

—against—

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,

Respondent.

Before:

FEINBERG, TIMBERS and MOORE,

Circuit Judges.

Petition for review of order of Board of Governors of the Federal Reserve System denying petitioner's application to retain ownership of a nonbanking subsidiary.

JOHN E. HOFFMAN, JR., New York, N.Y. (Shearman & Sterling, New York, N.Y., John J. Roche, Andrew S. O'Connor, of Counsel), *for Petitioner.*

FREDDI LIPSTEIN, Attorney, Appellate Section, Civil Division, Department of Justice, Washington, D.C. (Barbara Allen Babcock, Assistant Attorney General, Ronald R. Glancz, Attorney, Appellate Section, Civil Division, Department of Justice, Washington, D.C., Neal L. Petersen, General Counsel, J. Virgil Mattingly, Attorney, Board of Governors of the Federal Reserve System, Washington, D.C., of Counsel), *for Respondent.*

FEINBERG, Circuit Judge:

Citicorp, a bank holding company under the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §§ 1841-1850, petitions for review of an order of the Board of Governors of the Federal Reserve System, denying Citicorp's application to retain ownership of Advance Mortgage Corporation.[1] Citicorp contends that under a specific provision in the Act, the application had to be deemed granted by the Board's failure to rule on it within the statutory time limit of 91 days. Citicorp also argues that even if the Board's order was timely, the Board applied incorrect legal standards in denying the application and the order is not supported by substantial evidence. For reasons given below, we deny the petition for review and affirm the order of the Board.

I

The Bank Holding Company Act generally prohibits bank holding companies from engaging in nonbank activities. 12 U.S.C. § 1843. In 1970, the Act was amended to cover for the first time one-bank holding companies such as Citicorp. Bank Holding Company Act Amendments of 1970, 84 Stat. 1760. Absent approval of the Board, these companies must cease nonbank activities and divest shares of nonbank companies by December 31, 1980.[2] 12 U.S.C. § 1843(a)(2). In ruling on bank holding company applications to retain ownership or control of a company engaged in nonbank activities, the Board is instructed to consider various factors affecting the public interest, more fully discussed in Part III below. 12 U.S.C. § 1843(c)(8). Section 4(c) of the Act, 12 U.S.C. § 1843(c), provides that if the Board fails to act upon such an application within 91 days, the application is "deemed . . . granted."

In July 1970, petitioner Citicorp, now the second largest banking corporation in the United States, acquired all the voting shares of Advance Mortgage Corporation, now the nation's second largest mortgage banking company. Citicorp applied to the Board in 1973 to retain Advance, but was unsuccessful.[3] In 1977, Citicorp again submitted an application, the subject of this appeal.

At this point, the precise dates of various events become potentially significant, so we will list them in more detail than might otherwise be necessary. Citicorp submitted its application to the Federal Reserve Bank of New York on October 28, 1977.[4] On November 18, 1977, the Reserve

1. This court has jurisdiction under 12 U.S.C. § 1848.

2. There are exceptions to the divestiture requirement not pertinent here.

3. The Board denied this application in December 1973, but the ruling was without prejudice to renewal prior to the statutory deadline should Citicorp believe more persuasive evidence of public benefits had become available.

4. Board regulations require applications to be filed with the Federal Reserve Bank in the district in which the applicant is located. 12 C.F.R. § 262.3(b).

Bank requested additional information, which Citicorp delivered to the Bank on December 5, 1977. On December 13, the Bank forwarded the application to the Board in Washington, D. C., and sent Citicorp a letter formally acknowledging receipt of the application. The Board's public notice, dated December 30, 1977, soliciting comments on the application, was published on January 9, 1978 in the Federal Register. On January 17, Citicorp released its 1977 year-end financial statements and routinely forwarded a copy to the Board. Also on January 17, the Board received a staff memorandum from the New York Reserve Bank containing its analysis of, and recommendation on, Citicorp's proposed retention of Advance. The public comment period closed on January 27, 1978. Around February 3, 1978 the Board requested the 1977 year-end financial statements of Advance, which Citicorp supplied on February 8, stating that by doing so it did not acquiesce in the tolling or re-starting of the 91-day statutory time limit. On March 10, 1978 the Board requested, and Citicorp furnished, information concerning the extent of Advance's dependence on Citicorp for managerial resources.

The Board denied Citicorp's application on March 13, 1978 for reasons discussed in greater detail below. These may for present purposes be briefly summarized as holding that Citicorp had not sufficiently justified an exemption. Shortly thereafter, Citicorp filed its petition for review in this court.

II

As already indicated, the key provision of the Act on this petition for review is section 4(c), which provides in pertinent part:

> In the event of the failure of the Board to act on any application for an order under paragraph (8) of this subsection within the ninety-one-day period which begins on the date of submission to the Board of the complete record on that application, the application shall be deemed to have been granted.

The crucial question with regard to the timeliness of the Board's order under this section is when the 91-day statutory period began, an issue not previously considered in this circuit.[5] Citicorp contends that since the Board received no outside comments on the proposed retention of Advance, the application itself became the "complete record on that application." Thus, the time period started running on December 5, 1977, the date when Citicorp submitted the final additions to the application to the New York Reserve Bank, and the application was "deemed" granted 91 days later, on March 6, 1978.

The Board argues that Congress intended the 91-day period to commence only after all the data relevant to the Board's decision has been assembled. Thus, according to the Board, the earliest the time clock could have begun to run is December 13, when the application was forwarded from the New York Reserve Bank to the Board in Washing-

5. The Seventh Circuit, however, had decided several cases raising similar issues. See *Tri-State Bancorporation, Inc.* v. *Board of Governors of Federal Reserve System,* 524 F.2d 562 (7th Cir. 1975) (construing both § 1842(b) and § 1843(c)); *First Lincolnwood Corp.* v. *Board of Governors of Federal Reserve System,* 546 F.2d 718 (7th Cir. 1976) (construing § 1842(b)), modified en banc on other grounds, 560 F.2d 258 (1977), reversed, —— U.S. ——, 99 S.Ct. 505, 58, L.Ed.2d 484 (1978); *North Lawndale Economic Development Corp.* v. *Board of Governors of Federal Reserve System,* 553 F.2d 23 (7th Cir. 1977) (construing both § 1842(b) and § 1843(c)); *Central Wisconsin Bankshares, Inc.* v. *Board of Governors of Federal Reserve System,* 583 F.2d 294 (7th Cir. 1978) (construing § 1842(b)). In addition, one case on the issue is pending in the Ninth Circuit. *BankAmerica Corp.* v. *Board of Governors of Federal Reserve System,* Civ. No. 77-1005 (N.D.Cal.1977), appeal docketed, No. 77-3629 (9th Cir. Oct. 4, 1977). See also *Blackstone Valley Nat'l Bank* v. *Board of Governors of Federal Reserve System,* 537 F.2d 1146 (1st Cir. 1976).

ton. Since this was only 90 days prior to the Board's March 13 order denying the application, that order was timely and the automatic grant of section 4(c) was not triggered. The Board goes on, however, to suggest a number of alternative theories which would start the running of the 91-day time period much later, e.g., publication of notice in the Federal Register, expiration of the comment period after such notice and receipt of the year-end financials of Citicorp and Advance, the staff recommendation from the New York Reserve Bank and the information concerning Advance's dependence on Citicorp. Petitioner replies that the dates proposed by the Board relate to events within the Board's control, and that use of those occurrences to trigger the 91-day limit would render the statutory time constraint meaningless. Citicorp also asserts that the year-end financial statements did not provide any new data and that a Board request for irrelevant and unnecessary material should not re-start the time period.

The issues raised by these volleys back and forth are not simply resolved, since the language of section 4(c) is susceptible of conflicting interpretations. But contrary to petitioner's contention, the phrases "complete record" and "submission to the Board" imply that Congress at least did not intend the 91-day period to start as soon as a completed application is filed with a local Reserve Bank. The legislative history tends to support this view. The 91-day requirement of section 4(c), enacted as part of the 1970 amendments, was obviously a response to sluggish Board action in the past. See H.R.Rep. 387, 91st Cong., 1st Sess. 13 (1969). Cf. *White v. Mathews,* 559 F.2d 852 (2d Cir. 1977), cert. denied, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978). Yet, even a chief proponent of the new rule, when asked whether the 91-day period allowed enough time for consideration of complex applications, responded that the time would not begin to run until the application was

"cleaned up."[6] He explained that the statutory period would start when "[the Fed] was ready to investigate at the Board level and felt all they had to do was deliberate and not hunt for additional facts and send it back."[7] It is apparent that Congress was aware of the practice whereby applications were "cleaned up" by the local Reserve Bank and then forwarded to the Board. In this context, the words "submission to the Board" are significant, and we reject petitioner's argument that they mean "receipt within the Federal Reserve System."

A holding that the time period did not start until receipt of the application by the Board on December 13, 1977 would dispose of this case,[8] and it is tempting to stop there. We believe, however, that sound judicial administration requires consideration of at least one later starting point suggested by the Board. The statute requires "due notice and opportunity for hearing" upon an application such as the one here involved. 12 U.S.C. § 1843(c)(8). See also 12 C.F.R. § 225.4(b)(2). Even if no comments are received, the lack of objection to the proposal is an important fact for the Board, which is not confirmed until the close of the comment period. Further, a rule that if there are no comments the time period starts upon receipt of the application, but if comments are received the time period is restarted, would place the Board in somewhat of a dilemma.

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6. J. Harvie Wilkinson, Jr., testifying on behalf of the Association of Registered Bank Holding Companies, Hearings On Bills to Amend the Bank Holding Company Act of 1956, Before the Committee on Banking and Currency, United States Senate, 91st Cong., 2d Sess. 961 (1970).

7. Id.

8. Such a holding is apparently consistent with the Seventh Circuit position. See *North Lawndale, supra* note 5, 553 F.2d at 24, 26-27.

In order to assure the full 91 days for careful deliberation, the Board would have to assume that no comments would be received and begin intensive deliberations during the comment period. Then if there were comments that altered the focus of inquiry or changed the information available to the Board, the initial deliberations might become useless. We do not think Congress intended to force the Board either to waste time in possibly premature deliberations or to sacrifice part of its 91 days for decision-making. Thus we hold that ordinarily the 91-day period does not begin until at least expiration of the period for comments upon an application.[9]

We recognize that the purpose of the statute could be undercut if the local Reserve Bank unduly delays in forwarding an application to the Board, or if the Board delays in publishing notice, or allows an unreasonably long period for comments. Concern with Board control of the commencement of the time period also has been expressed by the Seventh Circuit in its opinions dealing with the 91-day time limit.[10] Most recently, that court stated:

> The purpose of the 91-day rule was to counteract the dilatoriness of the Fed. The rule would lose much of its effectiveness in serving this purpose if the Fed had discretion to determine when the 91-day period begins to run. (Citation omitted).

Central Wisconsin Bankshares, supra note 5, 583 F.2d at 296.

9. The Seventh Circuit rule is that the time clock starts when "the final material needed for the Fed's decision is received from the various interested sources outside of the Fed," *Tri-State, supra* note 5, 524 F.2d at 566, followed in *First Lincolnwood, supra* note 5, 546 F.2d at 721; *North Lawndale, supra* note 5, 553 F.2d at 28. Thus it would appear that in that circuit the time period could start earlier than the close of the comment period, see *North Lawndale, supra*, 553 F.2d at 26-27.

10. *Tri-State, supra* note 5, 524 F.2d at 566; *North Lawndale, supra* note 5, 553 F.2d at 27.

Although Congress did not place an explicit deadline on completion of the Board's pre-deliberation activities, we think the Board's discretion to determine the start of the 91-day time period is limited by the implicit statutory requirement that these activities be accomplished with reasonable promptness. Since the Board has chosen to have applications initially processed by local Reserve Banks, see note 4 *supra*, it is the Board's responsibility to oversee their performance of this activity. Thus any undue delay at the Reserve Bank level in forwarding the application should be substracted from the 91 days allotted to the Board. It is also the duty of the Board promptly to publish notice upon receipt of an application and to provide for a reasonably short comment period. Cf. 12 C.F.R. § 225.4(b)(2). We were informed at oral argument that an internal unpublished Board regulation provides for publication of notice within two weeks of receipt of an application and for a comment period of thirty days.[11] These objective guidelines adequately curtail the potential for Board control or manipulation of the time limit. However, we suggest that the Board add reasonably defined time periods to its already formally adopted and published regulations on this topic so the public and applicants can be assured of no undue delays.

11. A 1972 Federal Reserve opinion letter stated:

> It should be noted that, at a minimum, the complete record on a given application cannot be ready for submission to the Board prior to the expiration of any comment period. Normally, notice of an application is published in the Federal Register within five to seven days following acceptance of the application by a Reserve Bank. Generally 30 days are allowed for comment from interested persons, from the public, and from Federal and State supervisory authorities.

Letter from Federal Reserve System to Mr. Donald L. Rogers, Executive Director, Association of Registered Bank Holding Companies, Nov. 14, 1972, quoted in part in C. Blaine, Federal Regulation of Bank Holding Companies at 3-7 (1973).

The Board further suggests that after the period allowed for notice and comment, there may be instances when new data, such as the financial statements in this case, first become available. Or, the Board may discover during deliberations that further information would be helpful. The Board urges us to hold that the 91-day period does not start to run until such additional material is received, a position accepted by the Seventh Circuit so long as the new material is both relevant and necessary to the Board's decision.[12] The case for insuring that the Board is able to obtain and use such information after the close of the comment period is obviously a strong one, but whether receipt of such new data should re-start the entire 91-day period is more questionable. The potential for manipulation of the time constraint is greatest at this stage, as the deadline grows closer.[13] Moreover, as petitioner points out, new financial statements become available every quarter, and theoretically could be used to extend the time limit indefinitely, thus nullifying Congressional intent. Although the Seventh Circuit's relevant and necessary requirements in theory limit the Board's power to re-start the time period, in practical effect these restraints might be difficult to enforce. Virtually all new data about an applicant will be relevant to the Board's decision. And, without performing its own detailed analysis, and comparing the additional information with that previously available, it is difficult for

12. *Central Wisconsin Bankshares, supra* note 5, 583 F.2d at 296-97 & n.3; *North Lawndale, supra* note 5, 553 F.2d at 27; *First Lincolnwood, supra* note 5, 546 F.2d at 721; *Tri-State, supra* note 5, 524 F.2d at 566.

13. The Seventh Circuit has recognized this possibility and has indicated that the Board cannot gain the benefit of the re-starting doctrine if it is found to have acted in bad faith. *Central Wisconsin Bankshares, supra* note 5, 583 F.2d at 296 & n.3, citing *Tri-State, supra* note 5, 524 F.2d at 567.

a reviewing court to determine whether the new data was "necessary" to the decision.[14]

It is arguable, therefore, that a request for new information after the close of the comment period should not restart the 91-day period, but should merely toll the running of that period until the information is supplied by the applicant.[15] Such a tolling doctrine would still allow the Board freely to obtain additional relevant information and would encourage the applicant to comply with requests promptly. However, there are problems with this view, as well, not the least of which is that the Board may discover very late in the 91-day period that new information might be significant in its decision, and then, after obtaining the information, be left with only a few days in which to decide. Under the circumstances, we leave resolution of such issues to another day, when they are crucial to determination of the case before us.

14. The Board has been upheld in the two reported decisions in which it asserted that new information from sources outside the Board re-started the time period. *First Lincolnwood, supra* note 5, 546 F.2d at 721; *Central Wisconsin Bankshares, supra* note 5, 583 F.2d at 296-98. In *North Lawndale, supra* note 5, the court rejected the Board's argument that an oral conference between representatives of the applicant and Board personnel re-started the time period. 553 F.2d at 27. However, in that case the Board conceded that no new facts were presented at the conference. Id. In *Tri-State, supra* note 5, 524 F.2d at 564, 566, the court rejected the Board's argument that staff reports re-started the time period, but the Board did not argue that any new outside information had been received.

15. The Board itself adopted a tolling doctrine in its Nov. 14, 1972 opinion letter, *supra* note 11. However, the Board's rule gave its staff complete discretion to determine when the 91-day period started, a position with which we disagree.

The Seventh Circuit recently rejected a tolling theory, adopting the re-starting doctrine discussed in text at notes 12-14 *supra*. *Central Wisconsin Bankshares, supra* note 5, 583 F.2d at 296.

We do believe it prudent, however, to dispose of the further argument of the Board that the 91-day time limit does not ordinarily begin to run until the Board receives the staff reports of local Reserve Banks on an application that has already been submitted to the Board. In *Tri-State, supra* note 5, 524 F.2d at 566, the Seventh Circuit held that reports from the Board's own staff are not part of the "complete record" for purposes of commencement of the 91-day period. The Court reasoned that staff reports are part of the decisional process of the Board and that allowing their completion to determine the start of the 91-day period would give the Board complete control over the time period. We agree with this reasoning and think that it applies equally to staff reports from local Banks after an application is forwarded to the Board in Washington.[16]

We now turn to application of these general rules to the facts of the present case. We begin analysis with the date of Citicorp's submission of additional material for the application, December 5, 1977. The New York Reserve Bank forwarded the application to the Board within eight days thereafter and we think this was a reasonable period in which to examine the added material and determine that the application was complete. It appears that the Board received the application on December 14, 1977,[17] and notice was published in the Federal Register on January 9, 1978. Thus, it is apparent that the Board took a little longer to publish notice than the two weeks specified in its internal regulation. See text at note 11 *supra*. Under the Board's

16. Since the report from the New York Reserve Bank was received by the Board in this case prior to the close of the comment period, the issue is not determinative here. However, since such reports appear to be common, we think it wise judicial administration to dispose of this issue now.

17. The copy of the application in the record appears to have been stamped "77 Dec 14" and "Received Clearing Unit."

own internal policies, the notice should have been published by December 28, 1977 and the comment period should have closed around January 27, 1978. Therefore, we find that the time period began no earlier than January 28, 1978 and that the Board's March 13 order, clearly within 91 days of this date, was timely.

III

Petitioner also argues that the Board did not apply the correct legal standards in denying Citicorp's application and that the order is not supported by substantial evidence. We conclude that the Board correctly interpreted the statutory standards and that there is ample support for its order.

The applicable provision of the statute is section 4(c)(8), which provides that the prohibition on bank holding companies' ownership of nonbanking companies shall not apply to:

> shares of any company the activities of which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. In determining whether a particular activity is a proper incident to banking or managing or controlling banks the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices. In

> orders and regulations under this subsection, the Board may differentiate between activities commenced de novo and activities commenced by the acquisition, in whole or in part, of a going concern. . . .

This section has been interpreted to mean that the acquired activity must be "closely related to banking," and that the reasonably expected public benefits of the particular proposal must outweigh possible adverse effects. See, e. g., *Ass'n of Bank Travel Bureaus* v. *Board of Governors of Federal Reserve System*, 568 F.2d 549, 551-52 (7th Cir. 1978). The legislative history indicates that the burden is on the applicant affirmatively to establish the net public benefit of its proposal,[18] and the Board's findings may not be overturned if they are supported by substantial evidence.[19]

There was no serious issue before the Board with regard to the requirement that the activities of Advance Mortgage Corporation be "closely related to banking" since the Board has determined by regulation that mortgage banking meets that test. 12 C.F.R. § 225.4(a)(1) and (3). At issue before us is whether the Board correctly applied the factors specified in the second sentence of section 4(c)(8). The Board found that the acquisition of Advance lessened competition in the mortgage banking field by eliminating Citicorp as a potential de novo entrant, that the combination resulted in undue concentration of resources and that Citicorp's interest in Advance weakened Citicorp financially.

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18. See, e. g., H.R.Rep. 1747, 91st Cong., 2d Sess. (1970) (Conf.Rep.).

19. See 12 U.S.C. § 1848; *Alabama Ass'n of Insurance Agents* v. *Board of Governors of Federal Reserve System*, 533 F.2d 224, 246 (5th Cir. 1976); *Independent Bankers Ass'n of Georgia* v. *Board of Governors of Federal Reserve System*, 170 U.S.App.D.C. 278, 289, 516 F.2d 1206, 1217 (1975). *Cf. Board of Governors of Federal Reserve System* v. *First Lincolnwood Corp.*, —— U.S. ——, 99 S.Ct. 505, 58 L.Ed.2d 484 (1978).

The Board considered the public benefits which Citicorp asserted the acquisition produced—Advance's product innovation, expanded services, commitment of funds to neighborhood preservation projects and its countercyclical role in mortgage acquisitions. However, the Board concluded that some of the claimed benefits had anticompetitive effects, that others could have been achieved through Citicorp's de novo entry into mortgage banking and that the actual public benefits of the acquisition did not outweigh the adverse effects.

Focusing particularly on the Board's finding that the acquisition would result in undue concentration of resources, petitioner asserts that the Board improperly condemned size alone and found no specific adverse effects flowing from the concentration. But the specific statutory reference to "undue concentration of resources" as one of the "possible adverse effects" reflected a Congressional concern over control of economic resources that contemplated a more searching inquiry than the usual antitrust considerations of ease of entry and relative market shares. Cf. H.R.Rep. 1747, *supra* note 18, at 17. We agree with the conclusion of the Fifth Circuit that "Congress believed that concentration of economic resources in a single entity beyond a certain point was harmful regardless of the proven existence of any anticompetitive effects of such concentration." *Alabama Association of Insurance Agents* v. *Board of Governors of Federal Reserve System*, 533 F.2d 224, 251 (5th Cir. 1976), amended and rehearing denied, 558 F.2d 729 (1977), cert. denied, 435 U.S. 904, 98 S.Ct. 1448, 55 L.Ed.2d 494 (1978). Although this does not mean that Congress has condemned bigness as bad per se, we think Congress did commit to the expertise of the Board the task of determining when size alone makes the combination of banking and nonbanking corporations against the public interest. With regard to

this factor, we conclude that the Board in this case applied the proper legal standard and the record supports its conclusion.

The Board also justifiably found that the combination produced anticompetitive effects. It is clear that competition between Citicorp and Advance has been lost in the origination of construction and income-producing property loans and that there was a basis for finding that the acquisition caused loss of Citicorp as a potential competitor in the residential mortgage loan business. In determining the anticompetitive effects of the acquisition, the Board properly took into account the likelihood that Citicorp would have entered into mortgage banking de novo or through acquisition of a smaller firm. As indicated above, the statute specifically permits the Board to "differentiate between activities commenced de novo and activities commenced by the acquisition, in whole or in part, of a going concern. . . ."

The weighing of possible adverse effects against reasonably expected public benefits is committed to the expertise of the Board, and in this case the Board's findings are supported by the evidence. In conclusion, we hold that the Board's March 13, 1978 order denying Citicorp's application to retain Advance Mortgage Corporation was timely and in conformity with the governing statutory standards and the evidence. We deny Citicorp's petition for review and affirm the order of the Board.

Appendix B

Portions of Section 4 of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1843.

Interest in nonbanking organizations—Ownership or control of voting shares of any company not a bank; engagement in activities other than banking

(a) Except as otherwise provided in this chapter, no bank holding company shall—

(1) after May 9, 1956, acquire direct or indirect ownership or control of any voting shares of any company which is not a bank, or

(2) after two years from the date as of which it becomes a bank holding company, or in the case of a company which has been continuously affiliated since May 15, 1955, with a company which was registered under the Investment Company Act of 1940, prior to May 15, 1955, in such a manner as to constitute an affiliated company within the meaning of that Act, after December 31, 1978, or, in the case of any company which becomes, as a result of the enactment of the Bank Holding Company Act Amendments of 1970, a bank holding company on the date of such enactment, after December 31, 1980, retain direct or indirect ownership or control of any voting shares of any company which is not a bank or bank holding company or engage in any activities other than (A) those of banking or of managing or controlling banks and other subsidiaries authorized under this chapter or of furnishing services to or performing services for its subsidiaries, and (B) those permitted under paragraph (8) of subsection (c) of this subject to all the conditions specified in such paragraph or in any order or regulation issued by the Board under such paragraph: *Provided,* That a company covered in 1970 may also

engage in those activities in which directly or through a subsidiary (i) it was lawfully engaged on June 30, 1968 (or on a date subsequent to June 30, 1968 in the case of activities carried on as the result of the acquisition by such company or subsidiary, pursuant to a binding written contract entered into on or before June 30, 1968, of another company engaged in such activities at the time of the acquisition), and (ii) it has been continuously engaged since June 30, 1968 (or such subsequent date). The Board by order, after opportunity for hearing, may terminate the authority conferred by the preceding proviso on any company to engage directly or through a subsidiary in any activity otherwise permitted by that proviso if it determines, having due regard to the purposes of this chapter that such action is necessary to prevent undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices; and in the case of any such company controlling a bank having bank assets in excess of $60,000,000 on or after December 31, 1970, the Board shall determine, within two years after such date (or, if later, within two years after the date on which the bank assets first exceed $60,000,000), whether the authority conferred by the preceding proviso with respect to such company should be terminated as provided in this sentence. Nothing in this paragraph shall be construed to authorize any bank holding company referred to in the preceding proviso, or any subsidiary thereof, to engage in activities authorized by that proviso through the acquisition, pursuant to a contract entered into after June 30, 1968, of any interest in or the assets of a going concern engaged in such activities. Any company which is authorized to engage in any activity pursuant to the preceding proviso or subsection (d) of this section but, as a result of action of the Board, is required to terminate such activity may (notwithstanding any otherwise applicable time limit prescribed in this paragraph) retain the ownership or

control of shares in any company carrying on such activity for a period of ten years from the date on which its authority was so terminated by the Board.

The Board is authorized, upon application by a bank holding company, to extend the two year period referred to in paragraph (2) above from time to time as to such bank holding company for not more than one year at a time, if, in its judgment, such an extension would not be detrimental to the public interest, but no such extensions shall in the aggregate exceed three years.

* * * * *

Exemptions

(c) The prohibitions in this section shall not apply to any bank holding company which is (i) a labor, agricultural, or horticultural organization and which is exempt from taxation under section 501 of Title 26, or (ii) a company covered in 1970 more than 85 per centum of the voting stock of which was collectively owned on June 30, 1968, and continuously thereafter, directly or indirectly, by or for members of the same family, or their spouses, who are lineal descendants of common ancestors; and such prohibitions shall not, with respect to any other bank holding company, apply to—

* * * * *

(8) shares of any company the activities of which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. In determining whether a particular activity is a proper incident to banking or managing or controlling banks the Board shall consider whether its performance by an affiliate of

a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices. In orders and regulations under this subsection, the Board may differentiate between activities commenced de novo and activities commenced by the acquisition, in whole or in part, of a going concern....

* * * * *

In the event of the failure of the Board to act on any application for an order under paragraph (8) of this subsection within the ninety-one-day period which begins on the date of submission to the Board of the complete record on that application, the application shall be deemed to have been granted. The Board shall include in its annual report to the Congress a description and a statement of the reasons for approval of each activity approved by it by order or regulation under such paragraph during the period covered by the report.

Supreme Court, U. S.
FILED
APR 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1500

CITICORP,

Petitioner,

against

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL APPENDIX C

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APPENDIX C

BEFORE THE BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM

APPLICATION OF
CITICORP

ORDER DENYING RETENTION OF ADVANCE
MORTGAGE CORPORATION, EFFECTIVE MARCH 13, 1978

Citicorp, New York, New York, a bank holding company within the meaning of the Bank Holding Company Act of 1956, has applied for the Board's approval, under section 4(c)(8) of the Act (12 U.S.C. § 1843(c)(8)) and section 225.4(b)(2) of the Board's Regulation Y (12 C.F.R. § 225.4(b)(2)), to retain all of the voting shares of Advance Mortgage Corporation ("Advance"), Southfield, Michigan. Advance directly engages in the origination and placement of one-to-four family residential mortgage loans, servicing of mortgage loans for institutional investors, origination and servicing of mobile home instalment contract loans and extensions of credit to mobile home dealers to finance their inventories, and extensions of credit secured by second mortgages on one-to-four family residential properties and servicing of these loans. Such activities have been determined by the Board to be closely related to banking (12 C.F.R. § 225.4(a)(1) and (3)).[1]

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[1] Advance also operates through twelve direct subsidiaries and has an interest, acquired with the Board's consent under section 4(c)(13) of the Act, in First National Nippon Shinpan Co., Ltd., Tokyo, Japan, a company that engages in a variety of financing activities in Japan. One of Advance's subsidiaries, Lakeland Assurance, Inc., Phoenix, Arizona, engages in reinsurance activities that the

(Footnotes continued on following page)

Notice of the application, affording opportunity for interested persons to submit comments and views on the public interest factors, has been duly published (43 *Fed. Reg.* 1407). The time for filing comments and views has expired, and the Board has considered all comments received in light of the public interest factors set forth in section 4(c)(8) of the Act.

Applicant, with total assets of $77.1 billion and total deposits of $55.7 billion, is the second largest banking organization in the Nation.[2] In terms of domestic office deposits, it is the second largest of 223 banking organizations in New York State, with 13.8 per cent of the State's total deposits as of June 30, 1976.[3] In addition to its two bank subsidiaries, Citibank, N.A. ("Citibank"), New York, New York, and Citibank (New York State), N.A., Buffalo, New York, Applicant controls a number of domestic nonbank subsidiaries engaging in such activities as consumer, sales, and commercial finance, factoring, mortgage banking, sale and underwriting of credit-related insurance, and leasing. Its two largest nonbank subsidiaries are Advance and Nationwide Financial Services Corporation.

At the time of its acquisition by Applicant in 1970, Advance was the fourth largest mortgage banking firm in the United States measured by a mortgage servicing portfolio of $1.5 billion. As of June 30, 1977, Advance ranked as the

Board has not found to be closely related to banking, and this application does not seek authority to retain that subsidiary. On November 9, 1977, the Federal Reserve Bank of New York, pursuant to delegated authority, authorized Applicant through subsidiaries of Advance to engage in the sale of credit-related life and accident and health insurance to cover the outstanding balance of loans originated by Advance. The remaining subsidiaries of Advance are either inactive or engage in mortgage banking activities or provide services related to Advance's direct mortgage banking activities.

[2] Banking data are as of December 31, 1977, unless otherwise stated.

[3] In terms of total deposits, including foreign deposits, Applicant is the State's largest banking organization.

second largest mortgage banker in the country, with a servicing portfolio of $3.0 billion. In 1970, Advance was engaged primarily in originating and servicing one-to-four family mortgage loans. To a lesser extent it was engaged in originating and servicing loans on income-producing property and making short-term construction loans. Advance's direct activities now include originating and servicing one-to-four family mortgage loans, making mobile home and second mortgage loans, and providing financing for mobile home dealers. In 1976 Advance discontinued making construction loans and loans on income-producing property, and Applicant consolidated these activities within an operations subsidiary of Citibank. Advance currently operates 44 offices in 22 states, a net increase of 25 offices since it was acquired by Applicant.

This is the second time the Board has considered Applicant's proposal to retain shares of Advance.[4] On December 26, 1973, the Board denied an earlier application to retain those shares, without prejudice, however, to the filing of the present application.[5] In its earlier decision the Board found that Applicant's acquisition of Advance had eliminated some direct competition between Applicant and Advance in the origination of construction loans and loans on income-producing property; that it was likely Applicant would have entered some or all of the local markets served by Advance either *de novo* or by the acquisition of a smaller firm, and that the loss of this probable future competition in both local and national markets weighed against approval of the application; and that the combination of one of the country's largest banking organizations with one of the largest mortgage bankers presented the dangers Congress

[4] The shares Applicant seeks to retain were acquired in July, 1970. Under section 4(a)(2) of the Act they may not be retained after December 31, 1980, without Board approval.

[5] Application by First National City Corporation, 60 Federal Reserve BULLETIN 50 (1974).

feared might arise from an undue concentration of resources.

In order to approve an application under section 4(c)(8) of the Act, the Board must determine whether the activities of the company to be acquired or retained are "so closely related to banking or managing or controlling banks as to be a proper incident thereto." Where, as here, the activities of a nonbank company have been determined by regulation to be closely related to banking, the Board is required to consider whether a bank holding company's acquisition of that company "can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices." This statutory test requires a positive showing by an applicant that the public benefits of its proposal outweigh the possible adverse effects. In its first consideration of Applicant's proposal, the Board found that the reasonably expected public benefits did not outweigh the possible adverse effects summarized earlier. However, the Board, recognizing that clearer evidence regarding public interest factors might emerge from a longer period of affiliation between Applicant and Advance, indicated its willingness to entertain further evidence on the issue to the extent that such evidence might be helpful in illuminating or filing in details that were then otherwise difficult to evaluate.

The Board finds in the present record no new evidence sufficient to overcome its previous findings that the acquisition of Advance had an adverse effect on existing and future competition and concentration of resources. It is true that the mortgage banking industry is one characterized by low concentration. There are approximately 800 mortgage banking firms in the United States; the barriers to entry in the field are relatively low; and it is rare that

the leading firm in any market will have as much as ten per cent of the market's share of originations. Nevertheless, Advance was at the time it was acquired the fourth largest mortgage banker and is now the second largest, and Applicant's resources, in the Board's judgment, gave it the capability to enter the markets served by Advance *de novo* or through the acquisition of smaller firms. Such means of entry would have been more conducive to competition in many markets. For that reason the Board continues to view the effect of the acquisition of Advance on existing and potential competition and concentration of resources as adverse, and continues to believe those factors weigh against approval of this application for the reasons stated in its earlier Order.

It is recognized that Advance differs fundamentally from firms in other industries that engage in lending activities in that it is primarily a conduit for the dispersal of mortgage funds controlled by institutional investors. This fact and the fact that Advance is by any measure much smaller than Applicant mitigate to some extent concerns about aggregation of financial power, but the fact of fundamental importance in connection with this application is that both companies were among the very largest and most capable in their respective fields. For that reason the Board has viewed the elimination of one as a potential entrant to be a serious adverse effect of the acquisition. To outweigh this adverse effect it is insufficient to show that Applicant has taken one of the country's strongest mortgage bankers and made it stronger, more innovative, and more socially responsible. It is necessary to show that the public benefits would not be as likely to be achieved from a less anticompetitive available means of entry, or that they would be delayed or diluted to a degree that would offset the seriousness of the more anticompetitive consequences of this acquisition.

In this regard, Applicant has made two chief arguments: that large mortgage companies do not have a signifi-

cant advantage over small ones, and that a foothold or *de novo* affiliate would probably never expand to a significant size. The first argument understates the importance of Advance's servicing portfolio, which is substantially larger than that of most of its competitors. The continued income stream of its mortgage servicing portfolio combined with its access to Applicant's resources at rates below market place Advance in an almost uniquely superior competitive position within the industry to withstand periods of economic adversity at the expense of smaller organizations. The Board is likewise unable to agree with Applicant's second argument. Barriers to entry are sufficiently low in the industry and Applicant has sufficient resources and sufficient success with mobile home financing and other activities begun *de novo* by it, that the Board does not consider it unlikely that an affiliate smaller than Advance might reach a significant size within several years. Applicant has the resources and management and has shown an inclination toward retail business that indicates it could enter the mortgage banking field successfully through a smaller acquisition.

With respect to reasonably expected public benefits arising from the acquisition, the original record has been supplemented to a significant degree. Applicant has argued that it has caused Advance to assume a contracyclical role in mortgage originations, increasing originations during periods when conditions forced other originators to curtail their activities, and that this constitutes a public benefit that would have been unavailable if Advance had continued as an independent firm and Applicant had entered the market *de novo* or through a smaller acquisition. The record before the Board in 1973 did not establish that Applicant had caused Advance to originate a greater volume of mortgage loans than it could have done as an independent firm. It does in fact appear from the present record that Advance assumed such a role in 1974 and 1975, in contrast to the

industry generally and in contrast to Advance's own performance before its affiliation with Applicant. Advance's originations of one-to-four family residential mortgage loans, after a severe decline between 1970 and 1973, increased 121 per cent in 1974 and 31 per cent in 1975, while the mortgage banking industry increased such lending in those years by only 4 per cent and 14 per cent, respectively. During similar periods immediately prior to its affiliation with Applicant, Advance's performance was approximately in line with the industry average. Advance's share of the national mobile home loan market, a field it entered in 1973, has similarly contrasted with the industry's average performance.

While Advance's increased lending activities, while others were reducing their lending activities, may be viewed as having beneficial effects in maintaining the availability of home mortgage funds, Advance's continued emphasis on construction and related lending until 1976 and the fact that the proportion of Advance's business devoted to one-to-four family residential mortgage loans decreased from pre-affiliation levels do not entirely support Applicant's position regarding its special role in residential housing. The fact that Advance's construction lending is now performed by Citibank and its mobile home lending was commenced *de novo* strongly suggests that any impact in those lending areas could have been achieved by Applicant without the acquisition of Advance. Moreover, the Board does not believe the public benefits of Advance's contracyclical practices can be said to outweigh the possible adverse effects of the affiliation. On one side, it might have taken Applicant, as a *de novo* entrant, several years to reach a market position where it could have an important contracyclical impact, and it may not have been feasible for Advance to have adopted such a policy without access to Applicant's funds at rates below market. On the other side, Advance's access to Applicant's funds at rates not obtainable generally by its competitors represents one of the specific adverse effects

the Board believes can result from a concentration of resources.

Advance's behavior during 1974 and 1975 illustrates the fact that large firms have the economic strength to suffer losses and to sustain affiliates which can consequently achieve growth at the expense of smaller firms, however efficient, less capable of sustaining short-term losses. The Board believes that the direction by Congress that the Board consider possible undue concentration of resources and possible unfair competition in connection with applications under section 4, requires the Board to be concerned with the survival of independent organizations and the encouragement of independent entrants. In this context, there is no evidence that the actual effect of Advance's practices has permanently harmed competition in residential mortgage lending. The number of competitors has increased since 1970 in almost every SMSA Advance serves, and in only three SMSA's has Advance achieved more than a two per cent share of one-to-four family residential mortgage loan originations.[6] While this fact moderates somewhat the Board's concern, it is unable to conclude that the claimed public benefits of Advance's contracyclical impact can be said clearly to outweigh the anticompetitive and other adverse effects of the acquisition. In the Board's judgment, a smaller firm without a servicing portfolio the size of Advance's[7] but with access to Applicant's resources could have remained in the market when conditions forced other competitors to reduce their activity.

Because it is the Board's judgment that Applicant could itself enter new markets *de novo*, it does not view the opening of new offices by Advance as a public benefit of significance. The Board notes, however, that during the affiliation, Applicant has strengthened Advance's financial and managerial resources, and has broadened Advance's financial services and experimented with new products. While product innovation and expanded services generally have the effect of stimulating competition and are in themselves public benefits, the Board believes Applicant could have provided new and expanded services through less anticompetitive means. In particular, the new mobile home financing activities of Advance closely resemble types of consumer lending with which Applicant is experienced, and Applicant was already engaged in mobile home financing through its consumer finance subsidiary, Nationwide Financial Services Corporation, when Advance began that activity. Advance has also, since the Board's earlier decision, taken an active role in neighborhood preservation projects, and has committed between $25 million and $100 million over the next ten years to such projects. While the Board attaches significance to these public benefits, they are not in the Board's judgment sufficient to outweigh the acquisition's adverse effects, summarized earlier in this Order and in the Board's 1973 Order. Moreover, the benefits claimed by Applicant in 1973 and in this application have not been without their cost to Applicant. The Board notes that Applicant's support of Advance has diverted Applicant's already substantially leveraged financial resources and has resulted in losses to Applicant. The Board regards this as an adverse factor which further offsets the claimed public benefits.

Based on the foregoing and other considerations reflected in the record, the Board has determined that the balance of public interest factors the Board is required to consider under section 4(c)(8) is not favorable. Accordingly, the application is denied.

By order of the Board of Governors, effective March 13, 1978.

[6] Advance has been able to expand its mobile home financing very rapidly and capture large market shares in several mobile home loan markets over the same period, however.

[7] Advance is the second largest mortgage banker in the country and its servicing portfolio is approximately $1 billion greater than that of the seventh largest servicer.

Voting for this action: Chairman Miller and Governors Wallich, Coldwell, Jackson, and Partee. Absent and not voting: Governors Gardner and Burns.

(Signed) GRIFFITH L. GARWOOD,
Deputy Secretary of the Board.

[SEAL]

Supreme Court, U. S.
FILED
MAY 22 1979
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No. 78-1500

In the Supreme Court of the United States

OCTOBER TERM, 1978

CITICORP, PETITIONER

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 589 F. 2d 1182. The opinion of the Board of Governors of the Federal Reserve System (Supp. Pet. App. C) is reported at 64 Fed. Res. Bull. 321.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 1979, and the petition for a writ of certiorari was filed on April 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board of Governors acted on petitioner's application to retain its nonbanking subsidiary Advance Mortgage Corporation within the 91-day period established by 12 U.S.C. 1843(c).

STATEMENT

The Bank Holding Company Act generally prohibits bank holding companies from engaging in nonbanking activities or controlling nonbanking companies. Section 4(a)(1) of the Act, 12 U.S.C. 1843(a)(1). Under Section 4(c)(8), 12 U.S.C. 1843(c)(8), however, a bank holding company may apply for approval by the Board of Governors of the Federal Reserve System to engage in, acquire or retain nonbanking activities that the Board has determined to be "so closely related to banking * * * as to be a proper incident thereto."

Section 4(c) of the Act also provides in pertinent part:

> In the event of the failure of the Board to act on any application for an order under paragraph (8) of this subsection within the ninety-one-day period which begins on the date of submission to the Board of the complete record on that application, the application shall be deemed to have been granted.

On October 28, 1977, petitioner, the second largest bank holding company in the country, submitted to the New York Reserve Bank[1] its application to retain its nonbanking subsidiary Advance Mortgage Corporation, the second largest mortgage banking firm in the

[1]Applications must be submitted to a Reserve Bank for initial screening. 12 C.F.R. 225.4(b)(2) and 262.3(b).

nation.[2] On November 18 the Reserve Bank requested additional information, which petitioner delivered on December 5, 1977. The Reserve Bank then completed its initial review of the application, acknowledged its receipt, and forwarded it to the Board on December 13, 1977 (Pet. App. 3a-4a).[3]

On January 9, 1978, the Board published notice of the application in the Federal Register, as required by 12 U.S.C. 1843(c)(8), inviting interested persons to submit comments to the Board by January 27, 1978 (Pet. 5; Pet. App. 4a). During this period petitioner published its year-end financial statement, a copy of which was forwarded to the Board. After the comment period had closed (no comments were received), petitioner provided, at the Board's request, the year-end financial figures for Advance; on March 10 petitioner provided additional information concerning the effects of divestiture on petitioner and Advance (Pet. App. 4a).

On March 13, 1978, the Board denied petitioner's application to retain Advance. The Board concluded

[2]The Board had denied an application by petitioner in 1973 on the basis that the claimed public benefits did not outweigh the anticompetitive effects. The denial was without prejudice to another application should more persuasive evidence become available concerning the public benefits of retention (Pet. App. 3a n.3).

[3]The Reserve Bank did not, as petitioner asserts (Pet. 4), acknowledge that the December 5 submission "completed the record." Rather, the Reserve Bank's December 13 letter to petitioner formally acknowledged receipt of the application, stated that it was being forwarded to the Board for consideration, and expressly reserved the possibility that the need for additional information might arise during the course of the Board's deliberation (C.A. App. 284a).

that the claimed public benefits of the retention did not outweigh the anticompetitive effects and the undue concentration of resources (Pet. App. 4a; Supp. Pet. App. C).

Petitioner sought review in the court of appeals and contended that the Board's order was not timely under the 91-day provision of Section 4(c) of the Act. The court of appeals affirmed the Board's order (Pet. App. 1a-16a). The court held that the 91-day period does not begin to run until the application has been forwarded to the Board by the Reserve Bank—in this case, until December 13, 1977 (Pet. App. 6a-7a). Although that holding was sufficient to dispose of petitioner's claim (the Board acted within 91 days of December 13, 1977), the court also concluded, as an alternative ground for its decision (Pet. App. 8a), that "ordinarily the 91-day period does not begin until at least expiration of the period for comments upon an application." The court rejected petitioner's argument that its alternative construction of Section 4(c)(8) would be contrary to the statutory purpose of preventing undue delays by the Board, because the court found that there were objective guidelines, reflected in Board regulations, that adequately curtailed the Board's ability to circumvent the statutory time limit (Pet. App. 9a).

ARGUMENT

The court of appeals' decision is correct. There is no conflict among the circuits on the question presented and no other reason warranting this Court's review.

1. Petitioner contends (Pet. 6-7) that the court of appeals' conclusion that the 91-day period does not

begin until the end of the public comment period conflicts with decisions of the Seventh Circuit. That is incorrect.

First, petitioner overlooks the fact that the decision below was based on alternative grounds. The court of appeals concluded that the 91-day period does not begin in any case before the date on which the application is received at the Board's Washington office (Pet. App. 6a-7a). In this case that date was December 13, 1977. The Board denied the application 90 days later. The court based this conclusion on the statutory language, which states that the 91 days "begins on the date of submission *to the Board* of the *complete* record * * *." Section 4(c) of the Act (emphasis added). This holding also is supported by the legislative history (see Pet. App. 5a-7a) and is in complete accord with decisions of the Seventh Circuit, which also have held that the statutory period begins (at the earliest) with delivery of the application to the Board in Washington. See *First Lincolnwood Corp.* v. *Board of Governors*, 546 F. 2d 718, 721 (7th Cir. 1976), modified en banc on other grounds, 560 F. 2d 568 (1977), rev'd on other grounds, No. 77-832 (Dec. 11, 1978); *Tri-State Bancorporation, Inc,* v. *Board of Governors*, 524 F. 2d 562, 566 (7th Cir. 1975). Accordingly, the Seventh Circuit would have decided this case the same way the Second Circuit did. Any disagreement the courts may have about how much time may pass after the Board receives the application before the 91-day period begins to run is irrelevant to the proper disposition of this case.

Second, contrary to petitioner's assertion, there is no clear conflict between the Second Circuit's alternative

holding here and the Seventh Circuit decisions on which petitioner relies. In *Tri-State Bancorporation, Inc., supra*, 524 F. 2d at 566, the Seventh Circuit, in construing a 91-day provision in 12 U.S.C. 1842(b), stated that "the 91-day period * * * begins to run when the final material needed for the Fed's decision is received from the various interested sources outside of the Fed." Petitioner argues that under that test the 91-day period would begin sometime before the expiration of the public comment period, *i.e.*, when the last comment is received or, if no comments are received (as here), when the applicant's complete submission was received. But the Seventh Circuit decisions on which petitioner relies involved very different facts and issues. The Seventh Circuit's cases are consistent in principle with the conclusion of the court below that the period does not begin to run until after the close of the public comment period.

In *Tri-State Bancorporation, Inc., supra*, the court rejected the Board's argument that the period did not commence until the Board received the recommendation of its own staff with respect to the application; the court concluded that the period commenced when the Board received the applicant's amended application, which was nearly five months *after* the close of the public comment period (524 F. 2d at 564-566). The court reasoned that the statutory term "complete record" was intended to mean "the facts upon which the agency would pass, not the internal documents relating to the process of that passing" (524 F. 2d at 566). See also *First Lincolnwood Corp., supra*; *Central Wisconsin Bankshares, Inc.* v. *Board of Governors*, 583 F. 2d 294 (7th Cir. 1978). In *North Lawndale*

Economic Development Corp. v. *Board of Governors*, 553 F. 2d 23 (7th Cir. 1977), the court held that the 91-day period commenced on the date the Board received comments from the Community Services Administration. Although that date occurred approximately three weeks before the public comment period would have expired, the Board's decision was rendered more than 91 days after the expiration of the comment period; thus, the court had no occasion to consider the significance of the date on which the comment period expired, and the court did not do so.[4]

Finally, the Seventh Circuit's approach is consistent with the rationale of the Second Circuit in this case. The conclusion of the court in *Tri-State Bancorporation, Inc.* that the term "complete record" in Section 4(c) means "the facts upon which the agency would pass" (524 F. 2d at 566) is consistent with the Second Circuit's conclusion that the record includes the fact that comments have or have not been submitted. As the court below stated (Pet. App. 7a): "Even if no comments are received, the lack of objection to the proposal is an important fact for the Board, which is

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[4]Moreover, in *North Lawndale Economic Development Corp.*, the publication of the notice for public comment was delayed beyond the time limits specified in the Board's regulations (see 553 F. 2d at 26 & n.3). Under the Second Circuit's approach such delay would have been subtracted from the time available to the Board (Pet. App. 9a).

not confirmed until the close of the comment period."[5] Nothing in the Seventh Circuit's decisions suggests any disagreement with that view.

2. Petitioner also errs in arguing (Pet. 9-11) that the Second Circuit's decision undermines the statutory purpose of preventing delays by placing the events determining the commencement of the time period within the control of the Board. The court of appeals stressed (Pet. App. 9a) that unreasonable delays in forwarding applications from the Reserve Banks to the Board and in publishing notice in the Federal Register inviting public comment should be subtracted from the Board's time in determining when the 91-day period commences. The court also properly recognized that the Board's regulations specifying time limits for those actions adequately provide the courts with objective criteria for use in determining whether such delays are unreasonable (*ibid.*). In this case the court subtracted what it concluded was an undue delay in publishing the notice (Pet. App. 13a), and there is no reason to

[5]The court also correctly stated (Pet. App. 7a-8a) that petitioner's construction of Section 4(c)(8) would place the Board in an unreasonable dilemma: it would either have to begin intensive consideration of the application as soon as it is received (which might be a wasted effort in light of subsequently filed comments), or wait until the end of the comment period before commencing its consideration and thus forfeit part of its 91-day time period. The Second Circuit's holding that the "complete record" includes all results of the comment period avoids that problem.

conclude that the court erred in its application of the general principle to the facts of this case.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1979

[6]There is no merit to petitioner's further contention (Pet. 8-9) that the Federal Register notice and the ensuing public comment period in this case were unnecessary and duplicative because petitioner previously had published notice in local newspapers. Section 4(c)(8) expressly requires that there be "due notice and an opportunity for hearing" by the public, and at the time of petitioner's application the Board's implementing regulations required publication of notice both by the applicant in local newspapers and by the Board in the Federal Register. 12 C.F.R. 225.4(b)(2). Thus the Federal Register notice was legally required for purposes of informing the public, and petitioner's opinion that it was unnecessary is immaterial. (The Board has recently eliminated the requirement that the applicant publish local notice. 43 Fed. Reg. 60261 (Dec. 27, 1978). This issue thus has no prospective importance.)

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